JOHORE MINING AND STEVEDORING CO SDN BHD

v.

LAU YAU CHAI & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
RAUS SHARIF J
[ORIGINATING MOTION NO: R1-25-122-1999]
4 DECEMBER 2003

ADMINISTRATIVE LAW: *Remedies - Certiorari, application for - To quash award of Industrial Court - Whether Industrial Court had erred in law and acted in excess of jurisdiction - Whether judicial review warranted*

This was an application by the applicant for an order of *certiorari* to quash the Industrial Court's decision that the first respondent's dismissal was without just cause or excuse and awarding the first respondent compensation. The applicant contended that the Industrial Court had erred in law and acted in excess of its jurisdiction when it held that at the material time in question, the first respondent had been employed as the chief executive officer ('CEO') separately from the post of managing director, because it: (i) failed to take relevant matters into consideration; (ii) took irrelevant matters into consideration; (iii) misconstrued the provisions of the applicant's statement in reply; and (iv) reached a decision that was so perverse and devoid of plausible justification that no reasonable tribunal similarly circumstanced would have reached it.

Held:

[1] The Industrial Court, taking into account the relevant factors, had found as a fact that there was indeed a contract of employment entered into between the first respondent and the applicant as CEO, distinct from his position as managing director, and that the applicant was in breach of its contract with the first respondent. The Industrial Court had correctly concluded that the applicant no longer wanted to honour its part of the contract and the first respondent was justified in considering himself dismissed. Thus, the applicant's contention that the Industrial Court had taken irrelevant matters into consideration instead of relevant matters was devoid of any merit. There was no reason to interfere with the award as the learned chairman had examined with utmost care the pleadings and evidence adduced, and had reached a decision that was neither perverse nor devoid of plausible justification. (pp 178 d, 179 b, f-h & 180 a)

[Application dismissed.]

Case(s) referred to:
Catherine Lee v. Lee's Air Farming Ltd [1961] AC 12 ***(refd)***
Lau Yau Chai v. Johore Mining & Stevedoring Co Sdn Bhd [1997] 1 CLJ Supp 459 HC ***(refd)***
Schindler v. Northern Raincoat Co Ltd [1966] WCR 1038 ***(foll)***

Legislation referred to:
Industrial Relations Act 1967, s. 20(1)
Rules of the High Court 1980, O. 53

For the applicant - Raymond TC Low; M/s Shearn Delamore & Co
For the respondent - LG Seah; M/s Lobo & Assocs

Reported by Suresh Nathan

JUDGMENT

Raus Sharif J:

This is an application by the applicant for, *inter alia*, an order of *certiorari* to quash the decision of the Industrial Court in Award No. 556 of 1999 dated 23 October 1999. The Industrial Court held that the dismissal of the first respondent was without just cause or excuse and awarded the first respondent compensation totalling RM682,500, less the necessary statutory deductions.

The brief facts leading to this application are as follows:

The first respondent joined the applicant on 20 April 1977 as a Corporate Assistant. He was later appointed as a General Manager *vide* letter dated 21 May 1980. Subsequently, he was made the Deputy Managing Director before he was appointed the Managing Director starting from July 1983.

Aluminium Company of Canada (Alcan) was the majority shareholder of the applicant. The first respondent was treated as a Malaysian employee and pursuant to that he was paid a salary and annual bonus and was also given the annual increment. He was also paid performance payment in 1991.

Alcan's shareholders was later sold off to a Malaysian company. As the majority of the shareholders were new, the first respondent submitted a letter dated 14 April 1992 to the Management Committee enclosing a draft to formalise his terms and condition of services, which he already enjoyed and requested the matter be discussed at the next Management Committee meeting. At the time he sent the letter he was the Chief Executive Officer (CEO) of the applicant and his basic salary was RM17,500 per month.

The first respondent did not get a reply to his letter dated 14 April 1992. Thus, he again wrote to the applicant on the matter on 4 May 1992. However, there was no response.

Then came the eventful day of 12 May 1992. On that day at 9.30am the Board of Directors of the applicant held its 72nd meeting. Thereafter, at 12.30pm the Annual General Meeting was held. At the said meeting the first respondent was not re-elected as a director of the applicant. At 1.30pm the Board of Directors of the applicant held its 73rd meeting. At that meeting Encik Hashim bin Othman was appointed as Executive Deputy Chairman/Chief Executive Officer of the applicant. The post of the Managing Director was abolished. At 3.56pm the first respondent received a letter from the applicant informing him among others that he ceased to be the Managing Director of the company since he was not elected as a director at the Annual General Meeting and the Board of Directors at its meeting had decided to abolish the post of Managing Director.

The first respondent considered himself as dismissed by the applicant. He subsequently filed his representations under s. 20(1) of the Industrial Relations Act 1967 (the Act) to the Director General of Industrial Relations. The said representations were not settled and the matter was therefore, referred to the Industrial Court to be adjudicated.

In the Industrial Court, the applicant raised a preliminary objection, contending that the first respondent is not a 'workman' under a contract of employment. The Industrial Court upheld this preliminary objection *vide* Award No. 374 of 1994 and thereby dismissed the first respondent's claim.

The first respondent thereafter applied to the High Court *vide* Originating Motion No. R1-25-101-94 to quash the award but was unsuccessful. (See *Lau Yau Chai v. Johore Mining & Stevedoring Co Sdn. Bhd.* [1997] 1 CLJ Supp 459). The first respondent appealed to the Court of Appeal and the Court of Appeal allowed the appeal and reversed the said High Court decision. The Court of Appeal quashed the said award and remitted the case to the Industrial Court on the merits.

Pursuant to the order of the Court of Appeal, the Industrial Court heard the case and decided in favour of the first respondent.

In its statement pursuant to O. 53, the applicant has contended that the Industrial Court had erred in law and/or acted in excess of its jurisdiction when it held that at the material time in question, the first respondent had been employed as the CEO separate from the post of Managing Director.

It is the applicant's contention that the Industrial Court in ruling that the first respondent was at the material time employed as the CEO and not Managing Director had erred in law and acted in excess of jurisdiction in that:

i) it failed to take relevant matters with consideration;

ii) it took irrelevant matters into consideration;

iii) it misconstrued the provisions of the applicant's statement in reply; and iv) it reached a decision that was so perverse and devoid of plausible justification that no reasonable tribunal similarly circumstanced would have reached it.

It is clear that the applicant's entire case is based on its contention that the first respondent was the Managing Director and not a CEO. With respect, I am unable to agree. The Industrial Court had found as a fact that there was indeed a contract of employment entered into between the first respondent and the applicant as CEO, distinct from his position as Managing Director. In reaching its decision, the Industrial Court had taken the following, *inter alia*, into consideration which is apparent from the award:

a) the career history of the first respondent;

b) the circumstances leading to the appointment of the first respondent as the Managing Director;

c) the undisputed fact that the first respondent was an employee of the applicant at all material time;

d) the fact that the first respondent was earlier employed as a Corporate Assistance and also been appointed as a Director as far back as 24 April 1980;

e) the fact that the first respondent had gained promotion to various position since 1977 and then was later promoted to become Managing Director but yet remained as employee of the applicant;

f) that the only person who knew about the first respondent's job was one Caryll Birkett, the author of the letter promoting the first respondent as Managing Director but he was not called by the applicant to testify;

g) that the applicant's only witness had admitted that it was the job of CEO that the first respondent was paid a salary and EPF contribution;

h) that the new post of Executive Deputy Chairman/CEO was subsequently created soon after the first respondent was not elected as a director and the post of Managing Director was abolished. This contradicts the applicant company's contention that the post of Managing Director was also known as CEO.

Thus, I am of the view that the Industrial Court had correctly taken into account the aforesaid relevant considerations that the first respondent had entered into a contract of employment with the applicant whereby he wore '2 hats', that is the Managing Director and CEO. Indeed, it is a well established that the mere fact that someone is a director of a company is no impediment to his entering into a contract to serve the company. See *Catherine Lee v. Lee's Air Farming Ltd.* [1961] AC 12.

The said principle is also echoed in the case of *Schindler v. Northern Raincoat Co. Ltd.* [1966] WCK 1038. The facts in *Schindler*'s case is on all fours with our present case. In that case the plaintiff was to enter a 10 year service agreement as managing director with the defendant. Subsequently, however, the defendant's company had sold its share capital to another third party who did not want to retain the plaintiffs services. At an extraordinary general meeting of the defendant, the plaintiff was removed from office as a director. The court held that:

> ... there was an implied terms in the plaintiff's agreement that the defendant's company would do nothing of its own motion to put an end to the state of the circumstances which enabled the plaintiff to continue as managing director and accordingly, the defendant's company was in breach of its contact with the plaintiff.

Applying the above principle, I am of the view that the applicant in our present case was likewise in breach of its contract with the first respondent. The Industrial Court had correctly concluded that the applicant no longer wanted to honour its part of the contract and the first respondent was justified in considering himself as dismissed. Thus the contention of the applicant that the Industrial Court had failed to take relevant matters into consideration but took irrelevant matters into consideration is devoid of any merit.

I am also of the view that the Industrial Court did not misconstrue any of the parties pleadings as contended by the applicant. The learned Chairman had clearly addressed on the pleadings, the key issues of the award before making his decision. Looking at the award, the learned Chairman had examined with the utmost care, the pleadings and the evidence adduced. I have no reason to interfere with the award.

In conclusion, on the facts of this case, I am unable to hold that the Industrial Court has reached a decision that was so perverse and devoid of plausible justification that no reasonable tribunal similarly circumstanced would have reached it. Accordingly, the applicant's application is dismissed with cost.